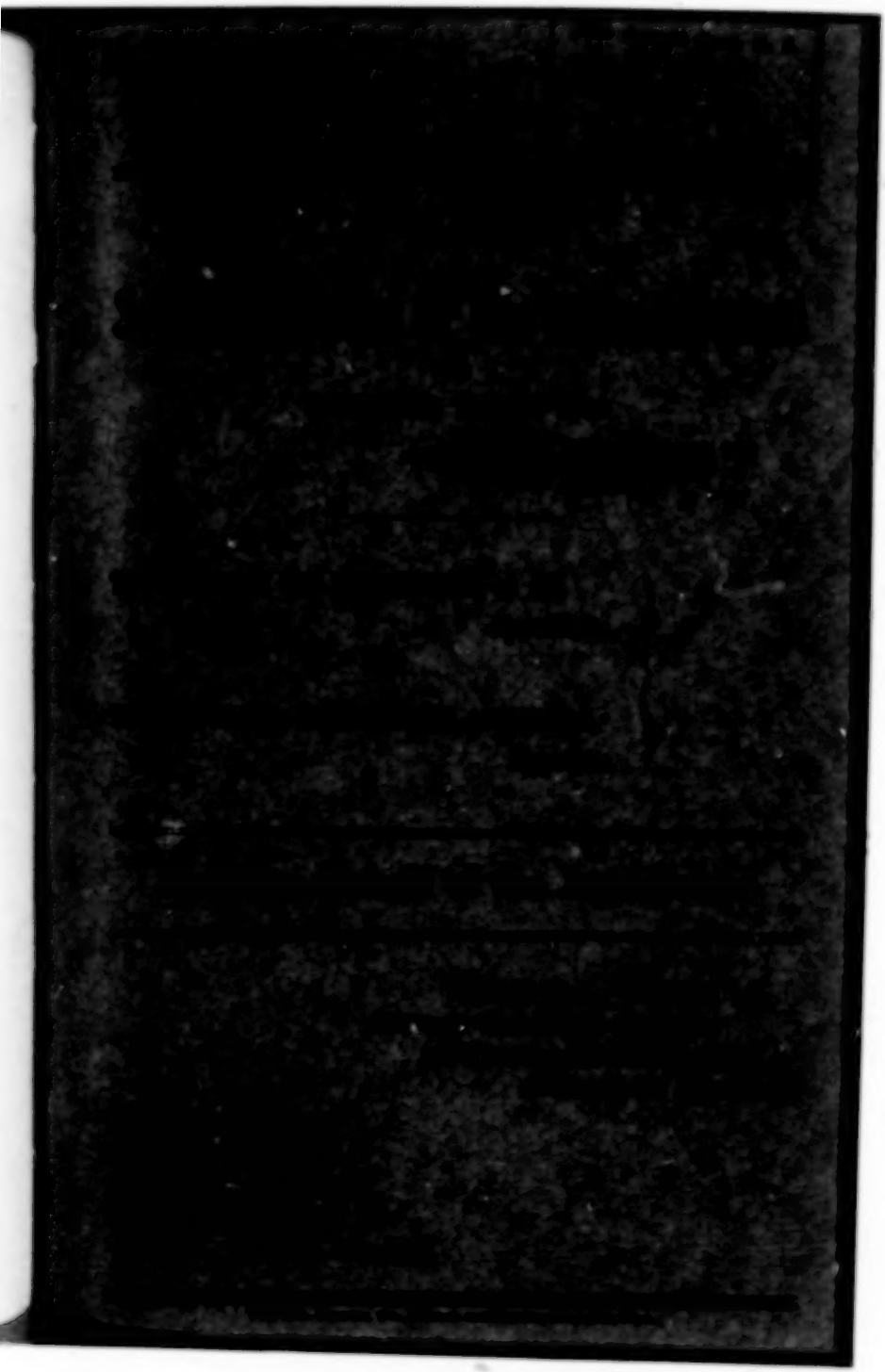

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1919

No. 742

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THE STATE OF WYOMING, *et al*,
*Appellants*,

vs.

THE UNITED STATES OF AMERICA,
*Appellee*.

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# Brief on Behalf of the Appellants

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## UNITED STATES STATUTES CITED

## CASES CITED

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## I.

## Statement of the Case.

This is a suit by the United States of America seeking to quiet in the United States the title to eighty acres of land claimed by the State of Wyoming as school lands and to require an accounting of profits.

### A. The Base Lands.

When Wyoming was admitted as a State July 10, 1890, it acquired title to the South-half of the South-east Quarter of Section 36, Township 53 North, Range 87 West of the Sixth Principal Meridian "for the support of common schools." These lands in Section 36 will be hereinafter spoken of as the "base lands."

In 1897, the President included said base lands in the Big Horn Forest Reserve.

### B. Selection of the Lands in Controversy.

In April, 1912, the State of Wyoming relinquished the base lands to the United States, selecting in lieu of them the lands in controversy. The lands selected were not classified as mineral lands, nor known to be mineral in character at the time of their selection. About two years later the President withdrew from entry a large body of lands, including the lands in controversy. And about two years after the withdrawal and prior to final action upon the selection by the Land Department, oil in paying quantities was discovered in the selected lands. The Secretary rejected the selection, and this terminated finally the proceedings in the Land Department.

This final rejection was based upon the withdrawal and the discovery of oil in the selected lands, both occurring some years after the selection by the State. In the final action rejecting the selection, the Secretary of the Interior uses this language:

> "Counsel have requested that specific findings be made to the sufficiency and due regularity of the State's application, as to the asserted fact that the land was not known to possess mineral value at the date of filing and as to the good faith of the State and its ignorance of the oil deposits since developed, when it applied. Findings with respect to these matters are sought because it is believed that litigation will ensue and that such findings would be of avail on behalf of the State. The Department must decline to undertake an adjudication of the questions suggested."

Printed Record, page 56, lines 34 to 43.

There was no finding of fact by the Land Department contrary to any fact here asserted by the appellants.

### C. The Bill of Complaint in this Case.

Within a year after the final decision by the Department, the United States brought this suit. The bill alleges that the State selected the land in controversy April 4, 1912, and that the selection was rejected August 17, 1916. (Record page 2, lines 17 to 35.) That on May 6, 1914, the President withdrew the lands from entry, (page 2, lines 7 to 15,) that about June 24, 1916, certain defendants leased the lands from the State of Wyoming for the purpose of drilling for oil, and have since extracted a large quantity of oil from the lands (page 2, line 45, to page 3, line 7.)

### D. The Answers.

The answers set up the title and rights acquired by the State of Wyoming through the selection of the lands in controversy in lieu of school lands which had been granted to and vested in the State by the Act of Admission of July 10, 1890 (26 Statutes 222). (Record page 10, line 1, to page 18, line 18; also page 20, line 30, to page 28, line 42.)

### E. Agreed Facts.

On the trial of the cause, it was agreed:

1. That the base lands were surveyed, agricultural, non-mineral, public lands of the United States at the time when Wyoming was admitted as a State.

(NOTE. It resulted from these facts that the base lands vested in the State for the use of common schools by the Act of Admission.)

2. That the base lands were still the property of the State of Wyoming when the State selected the lands in controversy and relinquished the base lands to the United States.

3. That the lands in controversy at the time of their selection had not been classified as mineral lands, and were unappropriated, surveyed, public lands of the United States within the State of Wyoming.

4. That in making its selection and relinquishment, the State of Wyoming complied with all laws and rules and regulations governing the same. (Record page 30, line 16, to page 31, line 12.)

**F. Other Facts Proven.**

Besides agreeing to the above facts, the United States introduced in evidence a certified copy of the records of the United States Land Office showing the relinquishment of the base lands to the United States and the selection of the lands in controversy by the State of Wyoming. (Record page 31, line 13, to page 61, line 20.)

The record so introduced in evidence by the Government contains an affidavit that the selected lands were non-mineral at the time of their selection. (Record page 33, line 24, to page 34, line 18.)

In addition to the agreed statement that the lands had not been classed as mineral lands and the non-mineral affidavit so introduced in evidence by the Government, the defendants, by two witnesses, proved the non-mineral character of the lands at the time of their selection. (Record page 65, lines 6 to 19.)

The defendants also introduced in evidence the proclamation of the President of February 22, 1897, creating the Big Horn Forest Reserve, and including in that Reserve the base lands then and thereafter up to the time of their relinquishment, the property of the State of Wyoming. (Record page 62, line 1, to page 65, line 5.)

There is nothing in the record in conflict with any of the agreed or proven facts above stated.

The only controverted question is entirely a question of law.

### G. The Decrees by the Lower Courts.

The District Court dismissed the bill on the merits. (Record page 66, lines 6 to 26.)

The Circuit Court of Appeals for the Eighth Circuit reversed the decree of the District Court, with directions to the trial court "to enter a decree in favor of the plaintiff in accordance with the prayer of the bill." (Record page 83, line 29, to page 84, line 9.)

The opinion of the Circuit Court of Appeals is in the record. (Record page 79.)

## II.

## Assignment of Errors.

The appellants at the proper time filed an assignment of errors, therein stating the grounds for the contention that the decision of the United States Circuit Court of Appeals for the Eighth Circuit is erroneous. We here assign as errors the same matters. They are as follows:

"1. The lands in controversy were lands of equal acreage selected by the State of Wyoming on April 4, 1912, in lieu of lands owned by the State in Section 36, Township 33 North of Range 87 West of the Sixth Principal Meridian in the State of Wyoming.

"Said base lands were surveyed, agricultural, non-mineral public lands of the United States at the time when Wyoming was admitted as a State, July 10, 1890, and by such admission became the property of the State of Wyoming for the support of common schools, and so remained to the time of the selection by the State of the lands in controversy.

"On February 22, 1897, by proclamation of the President of the United States the base lands were included in a forest reservation.

"At the time of their selection, the lands in controversy were unappropriated, surveyed, public lands of the United States within the State of Wyoming, which had not been classified as mineral lands, and were not in anywise known to be mineral lands.

"The State of Wyoming on April 14th, 1912, relinquished to the United States said base lands, and in lieu thereof selected the lands in controversy.

"In making such relinquishment and selection the State of Wyoming acted in entire good faith and complied with all statutes and rules and regulations of the Land Department then existing.

"No discovery of mineral in said lands was made until the year 1916, when oil was discovered therein.

"Therefore the United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the lands in controversy are the property of the United States.

"2. The United States Circuit Court of Appeals for the Eighth Circuit erred in finding

that the base lands at the time when they were relinquished by the State of Wyoming were lands that had been 'lost' to the State of Wyoming.

"3. In construing the expression 'not mineral in character' as contained in Section 2276 of the Revised Statutes of the United States providing for the selection of lieu lands, being the statute under which the selection in controversy was made, the Circuit Court of Appeals for the Eighth Circuit erred in finding that said expression 'not mineral in character' refers to the inherent character of the land, and erred in not finding that the said expression refers only to the known character of the land to be selected.

"4. The United States Circuit Court of Appeals for the Eighth Circuit erred in fixing the time when the Land Department rendered its decision upon the selection in controversy as the point of time at which the then known conditions of the selected lands determine the mineral or non-mineral character of the lands for purposes affecting the validity of the selection.

"5. The United States Circuit Court of Appeals for the Eighth Circuit erred in not fixing the time when the State of Wyoming relinquished the base lands which were relinquished by it and selected the lands in controversy, as the point of time at which the then known existing conditions determine the mineral or non-mineral character of the lands selected for purposes affecting the validity of the selection.

"6. Upon the facts as conceded by the parties and shown without conflict in the evidence, and determined by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, said United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the lands in controversy are the lands of the United States, and erred in failing to find that the

said lands are the property of the State of Wyoming, subject to leasehold rights in the other appellants.

"7. Upon the facts conceded by the parties, and shown by the evidence without conflict, and found by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, the said United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the rights of the State of Wyoming under its selection attached and took effect at the point of time when the State had done all that was incumbent upon it to do in the premises, and erred in finding that said rights of the State of Wyoming under its said selection were postponed to the time when the facts showing such performance by the State might be ascertained and declared by the land officers.

"8. Upon the facts conceded by the parties, and shown without conflict by the evidence, and found by the United States District Court for the District of Wyoming and by the United States Circuit Court of Appeals for the Eighth Circuit, said United States Circuit Court of Appeals for the Eighth Circuit erred in finding that the selection of the lands in controversy was subject to approval by the Land Department of the United States or by the Secretary of the Interior in some other sense than that said Land Department and said Secretary of the Interior were vested with the right and duty to determine the facts as they existed at the time of the selection of the lands in controversy by the State of Wyoming, and from said facts, so determined, ascertain and determine the validity of the selection.

"9. The United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the only power or duty of the Land Department of the United States and of the

Secretary of the Interior in relation to the selection of the lands in controversy was to determine the rights of the parties solely upon the facts as they existed at the time of the selection of said lands by the State of Wyoming.

"10. The United States Circuit Court of Appeals for the Eighth Circuit erred in failing to find that the only mineral lands excepted as such from the right of the State of Wyoming to select under Section 2276 of the Revised Statutes of the United States were lands then known to be mineral.

"11. The United States Circuit Court of Appeals for the Eighth Circuit erred in giving conclusive force and effect to mineral discoveries and developments made subsequent to the selection by the State of Wyoming of the lands in controversy, notwithstanding the fact that said selected lands were not known to be mineral lands at the time of the selection.

"12. The United States Circuit Court of Appeals for the Eighth Circuit erred in not affirming the judgment and decree of the United States District Court for the District of Wyoming."

(Page 85, line 11, to page 87, line 20.)

# III.

# Brief of the Argument.

As shown in the statement of facts, no question of fact is in dispute in this cause. The only controverted questions are questions of law.

The appellants contend that as matter of law rights in the lands in controversy under the undisputed facts vested in the State of Wyoming at the time of the selection of said lands, and that the discovery of mineral values in the lands years after their selection

did not divest the State of those rights. To state it in another form, the appellants contend:

1st. That since the State in making its selection under Sections 2275 and 2276 of the Revised Statutes of the United States complied with all the terms and conditions necessary to entitle the State to receive the selected lands, it acquired a vested interest in the selected lands at that point of time. The State's compliance with Sections 2275 and 2276, supra, (a) relinquished to the United States the base lands then owned by the State of Wyoming for the use of schools, but which while so owned by the State had been included in a forest reserve by proclamation of the President; and (b) vested in the State rights in the selected lands—the lands here in controversy—which were then unappropriated, surveyed, public lands, not mineral in character, within the State of Wyoming.

2nd. That questions respecting the mineral or non-mineral character of the selected lands as affecting the rights acquired by the selection are to be determined by the conditions existing at the time when all requirements necessary to obtaining title were complied with by the State and that no change in such conditions subsequently occurring can affect the State's rights.

The decision of the District Court sustains these contentions of the appellants. The decision of the Circuit Court of Appeals for the Eighth Circuit denies that any rights were acquired by the State, and denies that the State has any rights in the lands.

For convenience, we have printed in an appendix to this brief the section of the Act of Congress admitting Wyoming as a State, under which the State acquired the base lands, and also Sections 2275 and 2276 of the Revised Statutes of the United States, as

amended by the Act of February 28, 1891, (26 Statutes 796, 797) under which the State of Wyoming relinquished the base lands to the United States and selected the lands in controversy in lieu of the base lands.

**1. Sections 2275 and 2276 R. S. Gave the State the Right to Relinquish the Base Lands and select the Lands in Controversy in Exchange.**

In the case of California v. Deseret Water etc. Co., 243 U. S. 415, the question was whether certain lands in Section 16 were the sole property of the State of California, or in equity belonged to the United States. If the lands were the sole property of California, the plaintiffs in that case were authorized to condemn them under eminent domain proceedings. If the lands were the property of the United States, condemnantion could not be had.

The lands in section sixteen had passed to the State of California "by virtue of the Federal grant for school purposes." After the title so vested in the State, the Mono Forest Reserve was established by proclamation of the President. This reservation included Section sixteen within its boundaries. All but forty acres of Section sixteen were thereafter offered by the State as bases for lieu selections. These lieu selections had not been approved by the Secretary of the Interior. On the contrary they were still pending in the General Land Office even when this Court decided the case.

It was, of course, prior to any approval of the selection by the Secretary that the Deseret Water etc. Co. brought its condemnation suit to appropriate the land in Section sixteen. This Court in that case construes Sections 2275 and 2276 upon the point in-

volved in the case at bar. The Court distinguishes between the provisions of those sections which authorized the State to select other lands to supply deficiencies where lands failed to vest in the State and those provisions which authorized an exchange between the State and the Government under the circumstances involved in the case at bar, that is to say, where the base lands had actually vested in the State but were afterwards included in a forest reservation.

That case came to this Court on error to the Supreme Court of California. The Supreme Court of California in its decision of the case held that the base lands still remained the property of the State, and therefore that under the California statutes the Water Company could appropriate the lands by eminent domain proceedings.

The contention *contra* was that because the State after the inclusion of the base lands in a forest reserve had, under Sections 2275 and 2276, selected other lands in lieu of such base lands; the base lands in equity belonged to the United States, and therefore could not be condemned for the uses of the Water Company. This Court adopted the latter contention and reversed the decision of the Supreme Court of California.

**2. The Offer to Exchange was made by the Government.**

Upon its admission to the Union the State of Wyoming received full title to the base lands involved in this case. Some years thereafter Presidential Proclamation surrounded these base lands, (which were still owned by the State,) by a forest reserve. It was desirable, from the standpoint of the Government,

that the State should yield the base lands in order that the integrity of the forest reservation might be preserved. At the same time the creation of the forest reserve isolated the base lands, and hence made them less desirable for the State. California v. Deseret Water Company, supra, at page 420. Roughton v. Knight, 219 U. S. 537, at page 546.

For these reasons the Government by Sections 2275 and 2276 of the Revised Statutes made to the State the following offer:

> "Other lands of equal acreage are * * hereby appropriated and granted, and may be selected by said State * * where Sections sixteen and thirty-six are * * included within any * * reservation." R. S. Sec. 2275.
>
> "The lands appropriated by the preceding section shall be selected from any unappropriated surveyed public lands, not mineral in character, within the State." Sec. 2276.

And the proviso in Section 2275 added to the Government's offer the following stipulation:

> "The selection of such lands in lieu thereof by said State * * shall be a waiver of its right to said sections." sixteen or thirty-six, so included in the forest reserve.

This was an offer by the Government for the exchange of the lands. Roughton v. Knight, 219 U. S. 537, 546. All of the terms of the offer were fixed by the Government. Not only did the Government specify by general description the lands which it offered in the exchange and the lands which it would receive as an equivalent, but by its statutes and rules and regulations the Government fixed in all its details

the manner by which this offer might be accepted by the State. The State had nothing whatever to do with fixing the terms of the offer. That was entirely assumed by the Government, and it was left to the State only to accept or reject, and if it desired to accept, it could not choose its own method or form or any other matter in relation to it. It could merely surrender to the Government such lands as were described in the Government's offer, and select lands of equal acreage from those tendered by the Government, and in doing so follow methods and forms prescribed by the Government.

### 3. The State Accepted the Government's Offer.

The State of Wyoming made no offer whatever to the Government. Not a single word was added by the State to the offer made by the Government. On the contrary, the agreed facts and the evidence show that the State accepted the offer of the Government exactly as made.

First. The State surrendered lands which the Government's offer asked it to surrender for the preservation of the integrity of the forest reserve. The lands so surrendered filled every requirement of the Government's offer.

Second. In making the surrender of the base lands and in selecting the lands in controversy in lieu of the base lands, the agreed facts show that the State complied with every requirement of the Government's offer, including the requirements of the rules and regulations of the Land Department.

Third. The agreed facts and the evidence show, without conflict, that the lands selected were unappropriated, surveyed public lands, not mineral in

character, within the State, thus meeting the Government's offer as to the lands which the State was to receive in exchange for the base lands which it surrendered. Having so complied in full with the statutes and rules and regulations constituting the Government's offer, the State went into possession of the lands in controversy, and is now in possession upon that exchange. When an acceptance so completely fills the conditions of an offer, no counter acceptance is needed to complete the contract.

We have said that the lands in controversy were not mineral in character at the time of their selection by the State. Upon this point the proof is,

1st. The agreed fact that the lands had not been classified as mineral lands at the time of their selection. (Page 30, lines 29 to 32.)

2nd. The Government introduced in evidence the selection proceedings of the Land Department, and with those proceedings an affidavit made at the time showing that the lands were not mineral. (Page 33, line 24, to page 34, line 18.)

3rd. It was proven at the trial by two witnesses that the lands in controversy were not known to be mineral at the time of their selection. (Page 65, lines 6 to 14.)

4th. There was no evidence that the land was known to be mineral at the time of the selection.

It is clear, without conflict, that the land in controversy was not at the time of the selection "mineral in character" within the meaning of those words as often defined by this Court. It was not then "known to be mineral."

Deffeback v. Hawke, 115 U. S. 392, 404
Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 327.

Davis's Administrator v. Weibbold, 139 U. S. 507, 518.
Shaw v. Kellogg, 170 U. S. 312, 332.
Moran v. Horsky, 178 U. S. 205, 209.
United States v. Plowman, 216 U. S. 372, 374.
Diamond Coal and Coke Co. v. United States, 233 U. S. 236, 240.

It will be noted that this case is not like the cases where the Government has granted large areas of lieu land as donations to or in aid of railroad companies, or similar donations.

In such cases the railroads do not surrender or convey any lands to the Government in exchange for lands received by them, nor are they expected to do so. It is a donation pure and simple, to be strictly construed in favor of the Government; and of course the terms of the donation itself must control. And it is usual as a part of those terms to provide that any selection made of lieu lands shall be "subject to the approval of the Secretary of the Interior," or "shall be made with the approval of the Secretary of the Interior," or similar expressions. Since the railroads in such cases give up nothing at the time of the selection, the very selection itself is made a joint act of the railroad, or the officer acting on its behalf, and the Secretary of the Interior.

**4. An Exchange of Lands for Lands between a Sovereign Nation and a Sovereign State.**

Many differences between the statutes donating lieu lands to the railroads on the one hand, and the statute here involved on the other hand, might be pointed out.

1st. In the case at bar the State, as required by the statute, at the time of the selection surrendered for

the lands selected an equal acreage of other lands. Under the statutes donating lieu lands to Railroad Companies the Railroad Company surrenders no lands, and the statutes provide for no surrender of lands or any other thing by the Railroad Company.

2nd. In the cases of railroad lieu land donations one of the conditions usually specifically mentioned in the statute making the donation is that the selection shall be made subject to the approval of the Secretary of the Interior. In the case at bar no such requirement is made.

3rd. In the railroad indemnity land grants there are no provisions that the selection by the Railroad should have any effect whatever before approval of the selection by the Secretary of the Interior. In the case at bar the statute provides that "the selection of such lands in lieu thereof by said State shall be a waiver of its right" to the base lands. And, as we have seen from the case of California v. Deseret Water Company, supra, and as the language of the statute itself provides, it is the selection by the State, with nothing whatever done by the Land Department, or by any one else, that operates to surrender the base lands. It would seem strange that the "selection by the State" should be held a selection such as would transfer equitable title to the United States of the base lands, and at the same time that it was not a selection in fact, and gave no rights to the State in the selected land because not approved by the Secretary of the Interior. The statutes are so different in their purpose and in their terms and provisions and in the circumstances under which they are applied as to leave little, if any, room for construing them alike. Each must be construed upon its own provisions.

**5. By Complying with the Statute the State acquired Equitable Title to the Lands in Controversy.**

"It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership."

Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 432.
Carroll v. Safford, 3 How. 441.
Lytle, et al. v. The State of Arkansas, et al., 9 How. 314.
Lessee of French v. Spencer, 21 How. 228.
Witherspoon v. Duncan, 4 Wall. 210.
Stark v. Starrs, 6 Wall. 402, 418.
Barney v. Dolph, 97 U. S. 652, 656.

"The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location."

Wirth v. Branson, 98 U. S. 118, 121.
Simmons v. Wagner, 101 U. S. 260.

Hedrick v. Atchison, Topeka & Santa Fe R. R., 167 U. S. 673, 679.
United States v. Detroit Lumber Co., 200 U. S. 321, 337.
El Paso Brick Co. v. McKnight, 233 U. S. 250, 256.

**6. Title not Affected by Discoveries of Minerals Afterwards.**

"A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual 'known mines' capable of being profitably worked for their product, so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed."

Colorado Coal Co. v. United States, 123 U. S. 307, 328.
Davis's Administrator v. Weibbold, 139 U. S. 507, 524.

**Similar Grants in Lieu of Rights Under Mexican Claims.**

"The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others.

The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say 'lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, preemption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral."

Shaw v. Kellogg, 170 U. S. 312, 332.

### 7. The Grant is in Praesenti.

The language of the Act clearly shows that the grant is *in praesenti*. The words of the statute are "other lands of equal acreage *are also hereby appropriated and granted.*".

In the case of Rutherford v. Greene's Heirs, 2 Wheaton 196, the Supreme Court construed an act of the Legislature of the State of North Carolina, and in so doing used the following language:

"The 10th section enacts, 'that 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns,

within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer.' This is the foundation of the title of the appellees.

"On the part of the appellant, it is contended, that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the state, nor present interest in General Greene. The court thinks differently. The words are words of absolute donation, not, indeed, of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers.

" 'Be it enacted, that 25,000 acres of land shall be allotted for and given to Major General Nathaniel Greene.' Persons had been appointed in a previous section to make particular allotments for individuals, out of this large territory reserved; and the words of this section contain a positive mandate to them to set apart 25,000 acres for General Greene. As the act was to be performed in future, the words directing it are necessarily in the future tense. 'Twenty-five thousand acres of land shall be allotted for and given to Major General Nathaniel Greene.' Given, when? The answer is unavoidable—when they shall be allotted. Given, how? Not by any future act for it is not the practice of legislation to enact, that a law shall be passed by some future legislature—but given by force of this act."

Page 197.

In conclusion the Court in that case uses this language:

"It is clearly and unanimously the opinion of this Court, that the act of 1782 vested a title

in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to that title, and attached it to the land surveyed."

Page 205.

In the case of Lessieur et al., v. Price, 12 Howard 59, the effect of a certain grant to the State of Missouri was considered. That act provided that,

"Four entire sections of land be, and the same are hereby granted to said State, (the state of Missouri,) for the purpose of fixing their seat of government thereon, which said sections shall, under the direction of the legislature of said state, be located, as near as may be, in one body at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States, provided that such locations shall be made prior to the public sale of the lands of the United States surrounding such location.' 3 Stat. at L., 547."

Page 61.

The court in its opinion states the proposition and its conclusion in this way:

"First, it is insisted 'that the location was void because there never was any communication made by any person for the state of Missouri to any officer of the United States having power to grant an application for, or allow any location of, said lands; and that such location should have been entered and recorded in the Registrar's office of the local land district.'

"The land was granted, by the act of 1820; it was a *present grant*, wanting identity to make it

perfect; and the legislature was vested with full power to select, and locate the land; and we need only here say, what was substantially said, by this court, in the case of Rutherford v. Green's Heirs, (2 Wheat., 196,) that the act of 1820 vested a title in the state of Missouri, of four sections; and that the selection made by the state legislature pursuant to the act of Congress, and the notice given of such location to the Surveyor-General, and the Register of the local district where the land lay, gave precision to the title and attached to it the land selected."

Page 76.

In the case of Schulenberg v. Harriman, 21 Wallace 44, the Supreme Court again considered the act granting lands to the State of Missouri construed in the case last above, and reached the same conclusions, first quoting from that case, and then proceeded:

"Numerous other decisions might be cited to the same purport. They establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them.

"The rules applicable to private transactions, which regard grants of future application—of lands to be afterwards designated—as mere contracts to convey, and not as actual conveyances, are founded upon the common law, which requires the possibility of present identification of

property to the validity of its transfer. A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires."

Page 62.

In each of the cases from which quotations are made as above in this paragraph, the grant was a donation pure and simple, yet it was construed as a present grant, and title was held to vest from the very moment of the identification of the lands. The Act was held in each case a conveyance as well as a statute.

In the case at bar the language of the statute involved is fully as clear, and the grant is not a donation to the State, but it is an exchange with the State. The reasons for holding that it takes effect as a conveyance at that very moment when the identification is completed by the surrender of the base lands and the selection of other lands instead, are stronger than in the cases last above cited.

**8. The Original Grant of School Lands to a State Takes Effect in Praesenti.**

It will be remembered that the statute here involved does not require any patent in order to vest in the State the title to the selected lands. In this respect the provisions are not unlike those in relation to the original vesting in the State of sections sixteen and thirty-six for the benefit of public schools.

In the case of Wyoming, as with many of the States, the Federal statute grants to the State sections numbered sixteen and thirty-six of every township of the State for the support of common schools. The grant is *in praesenti*, but all lands otherwise dis-

posed of and all mineral lands are excluded from the grant. For the Wyoming statute see 26 Statutes at Large 222-224.

Under such statutes it is held that unsurveyed lands do not pass until surveyed and the identity of sections sixteen and thirty-six determined.

It is likewise held that in order to be exempt as mineral lands, the lands must have been known to be mineral at the time of the admission of the State in the case of lands already surveyed, and at the time of the completion of the survey in the case of lands not surveyed when the State is admitted.

In every such grant the Land Department is authorized to determine whether lands in sections sixteen and thirty-six were mineral in character, or otherwise, at the time when the grant took effect by the admission or by the survey. Yet this right of the Land Department to determine the character of the lands does not at all prevent the grant from taking effect at the time of the admission or of the survey, as the case might be. The power of the Department is not in any sense a discretion. It is the power to investigate and determine the character of the lands at the time when the State's title vested, in case it ever vested. And the Department so exercised the power. For example, in the case of Rice v. State of California, 24 Land Decisions 14, the Land Department exercised its jurisdiction to determine the character of lands in section thirty-six. But that case followed the prior cases in the Department by holding that title to section thirty-six vests at the date of the survey; that the investigation as to the character of the land must relate to that date, and that the subsequent discovery of mineral would not divest the title.

"It has been repeatedly held that the State's title to school lands under the act of March 3, 1853 (10 Stat., 244), vests at the date of the completion of the survey, and if the land, although in reality mineral, was not then *known* to be mineral, the subsequent discovery of its mineral character would not divest the title which had already passed. (Abraham L. Miner, 9 L. D., 408; Pereira v. Jacks, 15 L. D., 273.)"

Rice v. State of California, 24 Land Decisions 14, 15.
Sherman v. Buick, 93 U. S. 209.
Heydenfeldt v. Daney etc. Mining Co., 93 U. S. 634.

"The rule which the Heydenfeldt Case established has, we understand, been uniformly followed in the land office. After reviewing the cases, Secretary Lamar concluded (December 6, 1887; to Stockslager, Commissioner, 6 L. D. 412, 417) that the school grant 'does not take effect until after survey, and if at that date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of, the State takes indemnity therefor.' And see, to the same effect, Niven v. California, 6 L. D. 439; Washington v. Kuhn, 24 L. D. 12, 13; California v, Wright, Id. 54, 57; South Dakota v. Riley, 34 L. D. 657, 660; South Dakota v. Thomas, 35 L. D. 171, 173; F. A. Hyde, 37 L. D. 164, 166; to Atty. Gen of Montana, 38 L. D. 247, 250."

United States v. Morrison, 240 U. S. 192, 207.

Such had been from the beginning the construction of the acts granting school lands to the various States. This was true notwithstanding the fact that the original grant was a donation to the

States for school purposes. The construction, nevertheless, had been uniform, as above indicated, that the grant was a present grant and took effect immediately upon the State's admission into the Union if the lands were then surveyed and so identified by the statute. If the lands were not then surveyed, the Act still took effect as a present grant as soon as the lands were surveyed, and thus became identified so that the Act could apply. The vesting of title did not await any approval by the Secretary of the Interior.

Sections 2275 and 2276 of the Revised Statutes were enacted in the light of such construction. They retained the same language of present grant. The great public purpose, common school education of the future citizen, beneficial to the United States as well as to the State and its people, was in the new grant exactly as in the original one.

In addition to all that, the new act, so far as involved in the case at bar, was not in any sense a donation to the State. It was an exchange by the Government with the State of lands for lands, acre for acre, and an exchange which, in addition to the great public purpose, was directly and specially beneficial to the United States in preserving the integrity of its forest reserve. If identification by the mere act of survey of the unsurveyed lands, without more, immediately vested title in the State in sections sixteen and thirty-six as donations, how much more did the identification by selection and surrender of base lands immediately vest in the State the title to the selected lands. If subsequent discovery of mineral in land so identified by a mere survey was without effect upon the State's title, how much more certainly would there be no effect upon the State's title when minerals were discovered subsequent to an identification of the lands

accomplished by their selection and the surrender of base lands in accordance with the terms of the statute. And that this must be the effect seems to us clear when we remember that Congress must have known the construction given to the original grant, as a grant *in praesenti* and operative as above indicated, and with that knowledge included in the amendment of Section 2275 the provision that the "selection of such lands in lieu thereof by said State shall be a waiver of its right" to the lands included in the forest reserve in lieu of which the selection is made.

> "In the case of James K. Jacks, et al., (7 L. D. 570), where there was a homestead entry, it was held that 'the subsequent discovery of coal, on a small portion of the land, after the final entry, cannot affect the right of the purchaser, who had completed his entry."
>
> "See also Harnish v. Wallace (13 L. D. 108).
>
> "From these authorities it is evident that the question of the character of the land must be determined, in the case of a homestead entry, as of the date when the final entry is made, and under the conditions then existing."
>
> Rea, et al. v. Stephenson, 15 Land Decisions 37, 38.

**9. Comparison of the State Lieu Land Act here Involved, with the Forest Reserve Lieu Land Act of June 4, 1897.**

Owing to certain analogies between the State Lieu Land Act here involved, (Sections 2275 and 2276, R. S.), and the Forest Reserve Lieu Land Act, of June 4, 1897, (30 Stats. 36), we here give, for the purpose of comparison, the language of the latter act, viz:

> "That in cases in which a tract covered by an unperfected bona fide claim or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such case for making the entry of record, or issuing the patent to cover the tract selected."

In defining the purpose and meaning of the latter act, this court in Roughton v. Knight, 219 U. S. 537, 546, (56 L. Ed. 326), speaking through Mr. Justice Lurton, said:

> "Upon its face the act (of June, 1897) is neither more nor less than a proposal by the Government for an exchange of claims to land unperfected, or lands under patents, situated within the exterior lines of a forest reservation, for an equal area of public land subject to entry elsewhere."

The State Lieu Land Act provides for two separate and distinct classes of cases.

1st. The first class of cases embraces those where for various reasons school lands were lost to and never vested in the State. This class is not here involved.

2nd. The second class of cases is made up of those in which the State lost no lands but received title, and while the title was still in the State it became desirable to the Government, perhaps also to the State, that an exchange of the lands should be made. One of the cases where such an exchange was desirable was the creation of a forest reserve surrounding the State lands. To this class the case at bar belongs.

As to this class the statute was and is a standing offer by the Government to exchange other Government lands for the State lands so included in the forest reservation.

This court in Roughton v. Knight, supra, at page 546, clearly shows, that justice to parties whose lands had been included, without their consent, in forest reserves, required the passage of such act; the court says:

> "The reasons for the provision are found in the disadvantages which result to such a settler or owner who had acquired his right before the creation of a reservation in the public land surrounding him. He was thereby isolated from neighborhood association, and deprived of the advantage of schools, churches, and of increasing value to his own land from occupation by others of the lands thus devoted to reservation purposes."

The same reasons, added to the Government's desire to preserve the integrity of the forest reserve, apply, and account for the exchange provisions in the State Lieu Land Act.

As to the time of the vesting of title, the State Lieu Land Act here involved, is more favorable to the State, than the Forest Reserve Lieu Land Act is to the selector thereunder, in the following particulars:

First: The State Lieu Land Act is a grant *in praesenti* of the selected lands—awaiting only their identification by selection—with all the characteristics of such a grant. The words used by Congress being "other lands of equal acreage are *hereby* appropriated and *granted* and may be selected by said State;" whereas the Forest Reserve Lieu Land Act was not a grant *in praesenti;* the words "grant" or "granted"

not being used, the language used merely being the settler or owner "may select in lieu thereof, . " etc.

Second: The State Lieu Land Act here under consideration expressly provides that the "selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections," thus showing that Congress intended that the act of "selection," should, of itself, "be a waiver" of the State's rights in the relinquished land, without awaiting the approval of the selection by the Land Department; and it has been so held in the Deseret case, supra.

Third: The beneficent purposes of the State Lieu Land Act—with no element of sordid or selfish interest to be served—being a grant to a sovereign state for educational purposes, for the benefit of all its citizens who are at the same time citizens of the Nation, entitles such act to a more liberal construction in favor of the grantee than applies to the Forest Reserve Lieu Land Act, in which the United States is merely making an offer of exchange, with no beneficent purposes in view.

**10. Decisions Construing the Exchange Provisions of the Forest Reserve Lieu Land Act of June 4, 1897.**

The following decisions of the Interior Department, construing the exchange provisions of the Forest Reserve Lieu Land Act of June 4, 1897, (30 Stats. 36), all hold that a selector acquires the equitable title to the selected lands when he has done all that the law and the authoritative regulations require of him; and that this vesting of the equitable title is not postponed until the Department decides that the selector has complied with the law and the regulations.

Gideon F. McDonald, 30 L. D. 124.
Clark vs. Northern Pac. 30 L. D. 145.
Kern Oil Co. vs. Clarke, 30 L. D. 550.
Gray Eagle Oil Co. vs. Clarke, 30 L. D. 570.
Kern Oil Co. vs. Clotfelter, 30 L. D. 583.
Mary E. Coffin, 31 L. D. 175.
Kern Oil Co. vs. Clarke, on Review, 31 L. D. 288.
Bakersfield Co. vs. Saalburg, 31 L. D. 312.

In the case of Kern Oil Company, et al. v. Clarke, 30 L. D. 550, (the leading case upon the subject,) the Secretary of the Interior had under consideration selections made under the Act of June 4, 1897. The decision by the Secretary discusses the various cases passing upon the question, and continues as follows:

> "The supreme court held, in the Shaw-Kellogg case, that lands vacant and 'not known to contain mineral' at the time of selection, passed under the act of 1860, whether subsequently discovered to be mineral or not. The same rule should be applied to selections under the law of 1897. It would be strange indeed, if by the latter act, Congress intended that one who, accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which at the time is vacant and open to settlement, and does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the land department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of lands in forest reservations from giving

up their titles, but would be against both the letter and spirit of the act. Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty.

"The Department accordingly holds:

"(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

"(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

"(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

"These principles are in no sense antagonistic to the established doctrine of the jurisdiction and control of the land department over the disposition of the public lands. Undoubtedly such jurisdiction and control exist until patent has been issued. Knight v. United States Land Association (142 U. S., 161); Michigan Land and Lumber Co. v. Rust (168 U. S., 589); Brown v. Hitchcock (173 U. S., 473); Hawley v. Diller (178 U. S., 476).

This jurisdiction extends to determining the question, whether or not the equitable title has passed, but it has never been held that where such title has once actually vested the land department has the power to destroy it. As said in Michigan Land and Lumber Co. v. Rust, supra;

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. Strother v. Lucas, 12 Pet., 410, 454; Grignon's Lessee v. Astor, 2 How., 319; Chouteau v. Eckhart, 2 How., 344, 372; Glasgow v. Hortiz, 1 Black, 595; Langdeau v. Hanes, 21 Wall., 521; Ryan v. Carter, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. 2449; Frasher v. O'Connor, 115 U. S., 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, Bagnell v. Broderick, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

"* * * In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

"See also Cornelius v. Kessel, (128 U. S., 456); Orchard v. Alexander (157 U. S., 372); and Parsons v. Venzke (164 U. S., 89). So, too, with respect to selections under the act of 1897. The land department has the jurisdiction and power, at any time before a patent is issued, to institute and carry on, after appropriate notice, such proceedings as may be necessary to enable it to

determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. *But the determination, when had, must relate to the time when, if at all, the selector has done all that is required of him in order to perfect his right to a patent.*"

(Page 564.) (The italics are ours.)

In the case of Kern Oil Company v. Clotfelter, 30 L. D. 583, which also arose under the Act of June 4, 1897, the Assistant Secretary in sending the case to the Commissioner of the General Land Office for further proceedings, uses the following language:

"You are accordingly directed to cause a hearing to be had upon said protests, at which the protestants will be required to take the burden of proof. The evidence bearing upon the mineral character of the lands selected should not be restricted to mineral discoveries or development upon these lands and to their geological formation, but may extend to the discovery and development of mineral on adjacent lands, and to their geological formation. The inquiry respecting both the occupancy and character of the selected lands will be directed to the conditions existing and known at the time (January 5, 1900) when Clotfelter filed the selections and submitted the requisite proofs in support thereof. No consideration will be given to any changes subsequently occurring or to any mineral discoveries or development subsequently made." (Page 587.)

In the case of Gideon F. McDonald, 30 L. D. 124, a forest lieu selection under the Act of June 4, 1897, was involved. In stating the matter, the Secretary of the Interior says:

"When the selection was filed the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of the forest reserve and a proper basis for a selection under said act, and the land selected by McDonald in exchange was, according to the records of your office, of the character subject to such selection and free from other claim or appropriation. By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, *thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired.* Your office will therefore carefully examine the papers and records pertaining to this selection and if it is found to be otherwise free from objection, the fact of the elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations will not prevent approval of the selection." (Italics ours.)

The same ruling was adopted in the case of Kern Oil Company v. Clarke, 31 L. D. 288.

The case of Farnum vs. Clarke, 148 Cal. 610, decided in 1906, was an action for specific performance of a contract by which Clarke had agreed to acquire certain lands by forest lieu selections, and sell them to Farnum. After making the selections, Clarke

refused to convey. The defense to the action was that Clarke had no title yet to convey, his selections standing unapproved. The court sustained plaintiff's position, and what was said of forest lieu selections is so appropriate here, and, we think, so convincing that we quote from the case at some length.:

> "When such a selection is made the locator acquires an interest in the land selected, and immediately upon the filing of such selection is to be regarded as the equitable owner of such land. (Kern Oil Co. v. Clarke, 30 L. Dec. Dept. Int., 550.) * * * * * *
>
> "It is to be remembered that under the act, one who has conveyed his title to lands within the forest reservation is not taking lands in lieu thereof, by grace of the government, but under a solemn contract relative to an exchange of lands. The United States pledged itself to grant him from the public domain lands of equal extent and area to those that he conveyed to it, the only condition imposed by the act being that, as so selected by him, they should be vacant and open to settlement. When a locator under the act files his selection in compliance with the rules and regulations of the land department, and accompanies it with proof that the lands of which he makes selection are vacant and open to settlement and these facts are true, the commissioner of the general land office has no arbitrary right to reject the selection, but must approve it, and upon such approval the right of the selector to the land takes effect by relation as of the date of his original selection."

It was also held in the same case, that the withdrawal of lands in a township from entry by order of the Commissioner after the selection papers had been filed, could not affect or interrupt the selection.

**11. Change of View by Land Department based on Misconception of the Cosmos Case (190 U. S. 301.)**

The doctrine established in Kern Oil Company v. Clarke, (30 L. D. 550), and other decisions in volumes 30 and 31 L. D., hereinbefore cited, remained the law of the Land Department until after the doctrine of such cases was supposed to have been changed by the Supreme Court decision in the Cosmos case (190 U. S. 301). This supposed Cosmos case doctrine was accepted by the Department for the first time in the case of C. W. Clarke, 32 L. D. 233, 235; and frequently thereafter the Cosmos case was made the basis of departmental decisions upon which the Government here relies; notably the case of Miller v. Thompson, 36 L. D. 492—the basic departmental decision relied upon by counsel for the Government here—which adopted the supposed doctrine of the Cosmos case as the law, in the following language (pp. 493-494):

> "In the pioneer cases, the Department entertained opinion, that under the act of 1897, questions respecting the class and character of the selected lands were to be determined by conditions existing at the time when all requirements laid upon the selector had been satisfied, as of which time by relation he would be regarded as the equitable owner, and no changes in such conditions subsequently occurring could affect his rights. The Supreme Court, however, when the question was presented in the case of Cosmos v. Gray Eagle Oil Co. (190 U. S. 301), enunciated the rule which controls in respect to this matter. The view borne by the weight of authority, is, that until the Land Department shall have determined the questions of law and fact involved in the

> proffered selection, and a formal approval has been given, the equitable title to the land selected does not pass from the Government. Clearwater Timber Co. v. Shoshone Co., 155 Fed. 612., and authorities cited in the opinion. Until such approval there is indeed in legal contemplation, no selection in fact, but only an application to select."

The Clearwater-Shoshone case referred to therein was another case based upon the supposed doctrine of the Cosmos case, and of course falls with such doctrine.

It will be noted that no other reference is made, in Miller v. Thompson, to the cases overruled, than to designate them as "pioneer cases of the Department," and that the sole basis for departing from the law of such decisions, is that the Supreme Court in the Cosmos case has "enunciated the rule that controls." There was no attempt to justify the Department's change of ruling, by any process of reasoning, or by pointing out any errors in the argument or conclusions of the former decisions; but the change of ruling is based entirely on the supposed compelling force of the Cosmos case; and when this foundation for the change of ruling is removed—as it has been in Daniels v. Wagner, as we will hereafter show—and as it is removed by a careful study of the opinion in the Cosmos case—it would seem that the change in ruling should likewise disappear.

Following this erroneous construction of the Cosmos case, and relying upon such case, the Assistant Secretary, in this case, quotes from the opinion in the Cosmos case as decisive of the case at bar, deducing therefrom the erroneous conclusion that no rights in the selected lands vested in the State until the approval of the selection by the Secretary of the Interior.

This brings us to the decision of the Circuit Court of Appeals here, from which this appeal is taken, which likewise follows this erroneous construction of the Cosmos case.

**12. Decision of the Circuit Court of Appeals here Based on Misconstruction of Cosmos Case, of Daniels v. Wagner, and Wisconsin v. Price County.**

In the decision of the Circuit Court of Appeals in this case, the law controlling the case at bar is made to pivot entirely upon that court's misconstruction of the Cosmos case, Daniels v. Wagner and Wisconsin v. Price County, as is apparent from the following extract from the opinion of the court below, which contains the essence of such opinion (See Record page 81) viz:

> "We think that it has been clearly determined by the Supreme Court that the State down to the time of the approval of the application by the Commissioner of the General Land Office acquires no estate, legal or equitable, in the lands applied for as against the government. The only right which it acquires by its application and the proceedings in the local land office is to be protected against any subsequent right in the tract being acquired by private parties in case the government decides to dispose of the lands as agricultural lands.
>
> "This in our judgment is placed beyond controversy by the decision of the Supreme Court in Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 511, 512, and more particularly by the decision of Cosmos Company v. Gray Eagle Oil Co., 190 U. S. 301. The latter case is directly in point. There are minor circumstances in which

it differs from the present case, but none of these constitutes a substantial ground of distinction. * * *

"The case of Daniels v. Wagner, 237 U. S. 547, does not impair the authority of the Cosmos case, * * * . All the Daniels case decides is this: That the applicant for lieu lands, by presenting his application to the local land office, acquires the right as against private individuals whose rights in the property arise subsequently, to be protected against such subsequent rights;"

It therefore becomes necessary to carefully examine such cases, which are deemed controlling here.

**13. The Decision in the Cosmos Case Does Not Support the Government's Contention.**

We find nothing in the Cosmos case to warrant any such deductions as seem to be made from it. That case, according to the bill of complaint filed in the Federal Court, was pending in the Land Department undecided when the bill was filed, and it was in fact still so pending in the Land Department when the case was decided in this Court. The case arose upon selections made, and relinquishment deeds filed under the Act of June 4, 1897. It seems to have been an easy case for the Land Department and some of the courts to misunderstand. Daniels v. Wagner, 237 U. S. 547, 560.

As originally brought, a Receiver was asked and an injunction to prevent waste in the Cosmos case. No appeal to the Circuit Court of Appeals or to this Court was taken from the rulings of the Circuit Court for the Southern District of California denying the receivership and the injunction.

The questions of preventing waste and preserving the property and its fruits, pending the proceedings in the Land Department, were therefore not before this Court. 190 U. S. 307.

The case stood upon the prayer of the bill "that complainant might have the judgment of the court that the full and complete equitable title to an undivided three-quarters interest in the property is vested in the complainant" etc., and the allegations of the bill supporting that prayer, these being challenged by demurrer. (Pages 306 and 307.)

Among the allegations of the bill are these: That Clarke was the owner of the lands there used as base lands through patent from the United States: that the base lands were included in a forest reserve: that thereupon Clarke relinquished and conveyed the base lands to the United States and selected in lieu of them the lands there in controversy: that the selected lands at the time of the selection were surveyed, unappropriated, vacant, non-mineral public lands: that the Register and Receiver of the local Land Office accepted Clarke's deed and filing: that defendants were in possession of the lands in controversy under mineral locations, having discovered oil therein: that the defendants protested the selection in the Land Department on the ground that the selected lands were not subject to selection because they were mineral lands: and that the protestants asked that the selection be rejected and disapproved. And the bill further alleges that "such protest is now pending before the Commissioner of the General Land Office." 190 U. S. 302, 303. This Court, in its opinion, holds:

First. That, the matters being in issue, before the courts could award the demanded relief to complainant, the alleged facts, (a) as to the base lands,

(b) as to the selected lands, and (c) as to the selection, must be adjudged and determined in its favor.

Second. That although courts can usually adjudge the facts in issue before them, the courts could not hear or determine any of these alleged facts *in that proceeding* because they were then pending in the Land Department, with jurisdiction in that department, and it was not proper that the court should forestall the decision of the Land Department (citing previous decisions of this Court.)

Third. That the mere allegations of the complainant as to the facts so in issue could not in that proceeding take the place of a determination of the facts since the complainant could not thus for himself determine the facts in issue in his own case.

Fourth: That the Register and Receiver of the local Land Office had not decided these facts, or any of them, and those officers were without authority to decide them. That there had therefore been no adjudication of the facts in issue.

Fifth. It could not be said that "complete equitable title" to the lands, such as would entitle the complainants to a decree in that case, existed in the complainant without determining and adjudging these undetermined essential facts which, as above indicated, and because of the special situation there, could not be determined in that suit.

And the Court held since these facts had not been determined, and could not be determined in that suit, and their determination was necessary before decree could be there entered for complainant, that the case was not in position to be tried in the court.

The Court, therefore, dismissed the bill in that case, not indeed upon the merits, but without prejudice. It was thus left so that when the facts should

be determined by a competent tribunal, or when all obstacles to their determination by the courts should removed, such suits might be brought as would protect and vindicate the rights of complainant, if indeed it should be found to have such rights.

As we view it, the above constitutes the whole of the things decided in the Cosmos case. The opinion sums up the matter thus:

> "Concluding as we do,, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such questions themselves. The Government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction cannot be taken away from it by the courts. United States v. Schurz, 102 U. S. 378, 385."
>
> 190 U. S. 315.

We can find no suggestion in the Cosmos case denying that the rights attach in favor of the selector when he has done that which the statute requires, notwithstanding delay of the approval by the Secretary of the Interior—no hint that the long line of decisions by this Court holding that rights accrue when the entryman has fully performed, was there overruled or intended to be overruled. Not one of this long line of cases is even mentioned in the opinion.

The court did not there have before it, much less did it decide, any question as to the point of time when equitable rights *vested* in the selector. It was concerned only with the question as to that point of time

at which the title could be considered so *adjudged* as to entitle complainants to a decree in a court which could not itself adjudge the facts. Indeed in that case this language is used:

> "It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the lands was made in the local land office, and when the patent subsequently issues the legal title will vest from the time of the selection."
>
> 190 U. S. 310.

Our conclusion that it was not there intended to overrule or modify any of the decisions of this Court to the effect that title vests at the time when the entryman has completed his compliance with the land laws is strengthened by the following paragraph in the opinion:

> "Again, in Gray Eagle Oil Company v. Clarke, 30 L. D. 570, it was also held that under the act of June 4, 1897, it must be shown that at the date of selection the selected lands were unoccupied as well as non-mineral in character, and that until that proof was submitted a *selector had not done that which converts the offer of exchange into a contract fully executed on his part whereby he secures a vested right in the selected land.* It is unnecessary for the court to express an opinion as to the correctness of these views of the Land Department as stated in its opinion in the above cases." (The italics are ours.)
>
> 190 U. S. 314.

Here the Court calls attention to a decision in the Land Department, which in harmony with decisions of this Court, some of which we have cited

above, holds, among other things, that where the selector has done all that is required of him under the statute therein involved, the offer of exchange as made by the Government is thereby converted "into a contract fully executed on the part of the selector, whereby he secures a vested right in the selected land." And upon that holding of the Land Department this Court goes on to say that, "It is unnecessary for the Court to express an opinion as to the correctness of these views."

When we remember that the views of the Land Department expressed by the Secretary in the case of Gray Eagle Oil Company v. Clarke, supra, were expressly based upon the long line of decisions by this Court, many quotations from which were made by the Secretary, and when we remember further that this long line of decisions is not at all mentioned, much less expressly overruled, in the Cosmos case, and then read from the Cosmos opinion that it was unnecessary for the court to express an opinion upon these views of the Land Department, it seems to us utterly impossible that the court could have intended there to overrule and reverse the decisions of the Land Department and the clear decisions of this Court holding that the point of time at which title vests is that point of time when the entryman has performed the things required by the statute as the conditions upon which he shall receive the land.

It is undoubtedly true, that the opinion of this Court in the Cosmos case contains certain general language that has been much misunderstood by the courts and the departments, and which taken alone, forgetting the facts and the context, has given rise to the erroneous opinion that until a forest lieu selection is approved by the Department, no vested right is obtained by the selection.

This Court in the Weyerhaeuser case (219 U. S. 380), in speaking of similar general language in the Sjoli case (199 U. S., 564), when construed in forgetfulness of the facts there involved, said:

> "That the general expressions in the Sjoli case are not persuasive here, clearly results from the demonstration which we have previously made, *that to apply them would be, in effect, to destroy the indemnity provisions of the granting act.*"

And it may be said here with equal force, that to give to this general language of the Cosmos case the meaning which the lower court gave to it, and which the Government is claiming for it, would not only overrule without referring to them many well-considered decisions of this Court and ignore the facts three involved and the real reasoning of the Court in that opinion, but also *would practically destroy the exchange feature of the Forest Reserve Lieu Land Act;* as it is upon the *ascertainable conditions at the time of the selection*, that the selector must rely in maknig his selection and not upon conditions that may thereafter occur.

Fortunately, however, we are not driven to rely upon our own interpretation as to what the Cosmos case decided, but we have in the later case of Daniels v. Wagner, 237 U. S., 547, this Court's own interpretation of the meaning of the Cosmos case, upon the very question here at issue; namely, as to whether after a Forest Lieu selector had fully complied with the law, and completed his selection, and the same was pending in the Land Department unapproved, the Secretary could make other disposition of the property — and the answer was unmistakably "NO."

**14. The Case of Daniels v. Wagner, 237 U. S. 547, (59 L. Ed., 1102) Analyzed, and Shown to Sustain Our Contention Here, and to Hold That the Cosmos Case is Not Opposed to Our Position.**

The case of Daniels v. Wagner, just mentioned, was a case in which the Secretary of the Interior had rejected a Forest Reserve Lieu Selection, in all respects regular and valid, and had awarded the land to subsequent claimants under the Homestead, Timber and Stone Acts. The reason given therefor, was that as the local land officers had in the first instance erroneously rejected the Daniels Forest Reserve Lieu selection, when they should have accepted it; and as the entries of the homesteaders and others had been subsequently allowed, the Department would not be justified in cancelling the later entries in order to protect the equities of Daniels under his prior selection. The Secretary used the following language in so deciding:

> "It matters not if Daniels' application was in all respects regular and might have been allowed when presented; yet it was within the competency of the Land Department to dispose of the said lands to other persons; and having done so Daniels will not now be heard to question the correctness of that disposition."

Daniels, relying upon his fully completed selection as vesting the equitable title in him, brought suit in equity against the successful entrymen, who had obtained patents, to have them declared trustees of the title for his benefit. The trial court, and on appeal, the Circuit Court of Appeals for the Ninth Circuit, sustained a demurrer to Daniel's complaint, on the ground that the action of the Secretary of the

Interior in refusing Daniel's claim was justified under the law as decided in Cosmos Exploration Co. v. Gray Eagle Oil Company, 190 U. S., 301, holding that the selector's title did not vest until approved by the Secretary; and it was therefore within his discretionary power to reject the selection, and allow the homestead and other entries which were subsequent in time.

In reaching its conclusions, the trial court (see Daniels v. Wagner, 194 Fed. pp. 973-975), refers to the case of Cosmos v. Gray Eagle Oil Co., 190 U. S., 303, and says:

> "In the latter case (the Cosmos case) the court said that the complete equitable title of the selector is not 'made out and cannot exist until a favorable decision by that Department (General Land Office) has been made regarding the sufficiency' of the proof and his right to the selected land, and that 'there must be a decision made somewhere regarding the rights asserted by the selector of the land under the act before complete equitable title to the land can exist; the mere filing of papers cannot create such a title. The applicant must comply with and conform to the Statute, and the selector cannot decide the question for himself'; and that authority to determine whether the selector had complied with the provisions of the act and the regulations of the Department is not vested in the local land officers, but in the Commissioner of the General Land Office, and until he has approved the application, the selector is not vested with the equitable title to the land he assumes to select.' Under this rule, it seems to me that the plaintiff acquired no title or right to the land selected by him by the mere filing of his application, and that it was within the power and jurisdiction of the Land Department to reject the same, and award the land to a subsequent entryman under the Timber

and Stone Act; and as a consequence that the plaintiff is not entitled to the relief prayed for in his bill."

Upon Appeal to the Circuit Court of Appeals, that Court (205 Fed. 235-238), speaking through Circuit Judge Gilbert, cites the Cosmos case as authority for its decision, and quotes therefrom, among other things, the following language:

> "There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete, equitable title to the land can exist. The mere filing of papers cannot create such title."

In commenting upon this language, the Court of Appeals said, page 238:

> "It is urged that this language of the court is dictum but we do not so regard it * * * and we deem it controlling in the decision of the present."

That the entire decision of such court was based upon the decision in the Cosmos case is evidenced by the following language of Judge Gilbert:

> "We consider the decision in the Cosmos Exploration Company case authority for sustaining the decree of the court below."

Bottom of page 239 and top of page 240.

This construction of the meaning of the Cosmos case was rejected by this Court when the case of Daniels v. Wagner reached this Court upon appeal. In that case this Court replies to this holding of the lower court that its decision is based upon the Cosmos case by saying:

"But we are of the opinion that this interpretation of the Cosmos case cannot be justified."

237 U. S., p. 560.

It is true that this Court in Daniels v. Wagner does not, in so many words, retract the general language of the Cosmos case upon which the lower courts relied in reaching their decisions. That general language interpreted by the facts and the reasoning there, needed no retraction. This Court in the Wagner case places its decision upon the general grounds that no right to decide contrary to the law, existed in the Secretary of the Interior, and that the facts and the law, and not the will of the Secretary of the Interior fixed the rights of the entryman. What this Court there said on this subject applies so aptly to the action of the Secretary of the Interior and the decision of the lower court in the present case, that we take the liberty of quoting the following rather lengthy extract therefrom p. 557.

"This brings us to determine whether the Land Department had a right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so, an authority the possession of which was sustained by both the courts below.

"In primarily testing the proposition from the point of view of principle it is well at once to exactly fix its true import. In doing so it is to be conceded, a, that the act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation to apply to the land office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation and upon the doing and offering

to do everything required by the law or the lawful regulations of the Land Department to be done or offered to be done for that purpose; b. that in the particular case the application to enter the lieu land came within the grant of the statute and all that was required by law or lawful regulation was done by the applicant in order to obtain entry, and c, that it was the plain duty of the proper authorities of the department on the filing of the entry in due course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where under an act of Congress a right is conferred to make an application to enter public land and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done and thus to deprive the individual of the right which the law gives him. And it becomes moreover certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed it becomes unnecessary to go further to demonstrate its want of foundation. And the inherent vice which thus clearly appears from the mere statement of the proposition when reduced to the ultimate conceptions which it involves is not relieved by the suggestion that the action taken in this case by the Department rested not upon the assumption that there was a

general discretion, but upon the assumption that such discretion arose because of the primary mistake made by the local land officers concerning the lieu entry and the allowance of the filing of claims which were subsequent in date. We say this because thus seemingly to limit the discretionary power exerted would in our opinion aggravate its manifest unsoundness for the power as thus qualified would come to this: That the commission of a wrong by the officers of the Department in disobeying the act of Congress and in denying to an individual a right expressly conferred upon him by law would become the generating source of a discretionary power to make the disobedience of law lawful and the taking away of the right of an individual legal. But this in another form of statement brings the proposition back to its real and essential basis."

We submit, with absolute confidence, that such decision of this Court in Daniels v. Wagner, both in the point actually decided, and upon principle and reasoning, is conclusive of this controversy. The decisions do not contain a more positive affirmation of the proposition that when an entryman has fully complied with the law, and thus earned the title, rights then vest in him and he cannot be deprived thereof by any subsequent departmental action. This principle is decisive of the present case.

**15. The Government's Construction of Daniels v. Wagner.**

In attempting to dispose of the case of Daniels v. Wagner, (237 U. S., 547) as sustaining the position of the State of Wyoming here, the Honorable Bo Sweeney, Assistant Secretary of the Interior, when this case was before the Department, said (Record page 48,)

"Daniels v. Wagner involved the rights of a forest reserve lieu selector under a prior selection as against individuals who received patent under subsequent homestead and timber and stone entries. The land department there had claimed the right under its discretionary power to reject a prior reserve lieu selection and patent the land to subsequent claimants. This the Supreme Court held was beyond its power."

Why did the Supreme Court so hold? The reason, as stated in this Court's decision, is in substance that the lieu selector by full compliance with the law, had acquired a vested right, which made the later entries unlawful, and the Government's patent in their favor of no avail. The rejection of the prior valid selection was as much beyond the power of the Secretary as was the issuing of patent to the new entryman. The new patent was beyond his power because the old rejection was beyond his power. When the present case was before the Secretary of the Interior — in the decisions both of Assistant Secretary Sweeney, and upon rehearing before First Assistant Secretary Vogelsang — the discussion in the departmental opinions of the case of Daniels v. Wagner was prefaced with the following quotations from the official syllabus of such case, namely (Record page 56,)

"One who has done everything essential, exacted either by law, or the lawful regulations of the Land Department, to obtain a right from the Land Office, conferred upon him by Congress, can not be deprived of that right either by the exercise of discretion or by a wrong committed by the Land Officers."

It is then sought to show that this Daniels case is not in conflict with the principles deduced by the department from the Cosmos case.

Upon rehearing, First Assistant Secretary Vogelsang attempted to dispose of the Daniels case by saying (Record page 56),

> "This Department had disregarded the rights of the prior forest lieu applicant, and had patented the land to junior homestead and timber land claimants. This was done under the assumption that the officials of the land department possessed a broad discretionary power to so dispose of the land upon equitable considerations. The Court (in Daniels v. Wagner) decided there was no basis for the assumption of such a discretionary power * * * * The Court did not decide that the lieu selector by compliance with all the essential requirements of the law and regulations, had obtained a vested equitable title to, or a vested interest in the land. It was decided that by the acts of the lieu selector he acquired priority, and a right that was paramount to *subsequent* claims."

The Secretary in this interpretation of the Daniels case accepts but half of the Court's conclusion (c) from the principles (a) and the facts (b) which we have quoted from the opinion in that case. The Secretary only concedes that the department was without authority to convey the land to someone else. The conclusion of the Court (c) is "that it was the plain duty of the proper authorities of the Department on the filing of the entry in due course to *grant* it." The Department had no more right to retain the lands for the United States than to grant them to some other entryman.

In the Daniels case the selection had never been approved by the Secretary of the Interior, yet it was held good against a subsequent entryman having United States Patent therefor. A United States

patent is the most formal and conclusive evidence of ownership that the law can confer. It passed to the defendants in the Daniels case all the title, interest and dominion over the land that the Government possessed, and therefore the patentee stood in the Government's shoes, so far as the title was concerned, and the reason that such patents did not pass the equitable as well as the legal title, was that the *equitable title had already passed to the selector,* by his prior unapproved selection, *and the Government had no lawful right to make any other disposition of the property;* hence the patentee was rightfully held to be a trustee of the legal title for the benefit of the selector, who was entitled to the land. What difference does it make, that the Secretary of the Interior in the Daniels case claimed the right to reject the Daniels selection, and allow and patent the later entries, as a proper exercise of his "discretionary powers," rather than under a positive legal right to do so? The reason he had no such "discretionary power," was because *he had no legal right to reject the title of the selector who had fully complied with the law.* This is clearly pointed out in Daniels v. Wagner in the very terse and forcible language heretofore quoted from that case.

**16. The Law as to When Railroad Indemnity Selections Take Effect so as to Prevent Other Disposition of the Selected Lands---and the Correct Construction of Wisconsin v. Price County as Fixed by Weyerhaueser v. Hoyt (219 U. S. 380; 55 L. Ed. 258.)**

The Court of Appeals in its decision, and counsel for the Government in the presentation of this case before that Court, placed much reliance upon the

decision of Wisconsin v. Price County 133 U. S., p. 496; 33 L. Ed. p. 687, and cited that case to show that in railroad indemnity selections the law is settled that no rights attach under such selections until the same are approved by the Secretary of the Interior, and hence by analogy it was claimed that the same doctrine should apply in the case at bar.

We admit that there are a number of expressions in the opinion in that case, that, disassociated from the point actually decided, may give rise to this construction of the case; but the case really only decided the one point, that the land covered by railroad indemnity selections is not subject to taxation by the State, until the selections have been approved by the Secretary of the Interior. In that particular case the selections involved had not been approved by the Secretary of the Interior, and the Secretary was insisting that the railroad company had already received over forty thousand acres more indemnity land than it was entitled to receive. The decision merely held that the approval of the Secretary was essential to the efficacy of the selections, so as to give the State the right to tax the selected lands. As a grant of indemnity lands in that case was by the statute expressly made "subject to the approval of the Secretary of the Interior," the Court held that the mere filing of the list of indemnity selections by the railroad company did not demonstrate that the selections were legal and valid; and that until the validity of the selections was determined by the approval of the Secretary, the State could not tax them. The case did not hold that the filing by the railroad company of a list of indemnity selections created no interest in the selected lands, or that the Government could dispose of such lands to others as it saw fit, at any time up to the date of

approval of such selections by the Secretary of the Interior — and such is not the law. The general expressions in the opinion do not authorize the conclusion that such is the law except when such general expressions are wrenched from their context.

Erroneous conclusions were similiarly drawn from the case of Sjoli v. Dreschel, 199 U. S. 564, and such erroneous conclusions were corrected by this Court in the case of Weyerhaeuser v. Hoyt, 219 U. S. 380. The opinion in the Weyerhaeuser case so closely touches some of the matters under discussion that we beg to make the following quotation:

> "It was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. It is also beyond dispute that as the only method provided by the granting act for executing the grant in this respect was a selection of the lieu lands by the railroad company subject to the approval of the Secretary of the Interior that a construction which would deprive the railroad company of its substantial right to select and would render nugatory the exertion of power of the Secretary of the Interior to approve lawful selections when made would destroy the right which it was the purpose of Congress to confer. That the effect of holding that lands lawfully embraced in the list of selections duly filed and awaiting the approval of the Secretary of the Interior could, in the interim, be appropriated at will by others would be destructive of the right of selection, is not only theoretically apparent from the mere statement of the proposition, but has moreover in actual experience been found to be the practical result of carrying that doctrine into effect.
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> * * * * * *
>
> The requirement of approval by the Secretary consequently imposed on that official the duty of

determining whether the selections *were lawful at the time they were made*, which is inconsistent with the theory that anyone could appropriate the selected lands pending action by the Secretary. The scope of the power to approve lists of selections conferred on the Secretary was clearly pointed out in Wisconsin Central Railroad v. Price, 133 U. S., 496, 511, where it was said that the power to approve was judicial in its nature. Possessing that attribute the authority involved not only the power but implied the duty to determine the *lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.* This view, while it demonstrates the unsoundness of the interpretation of the granting act which the contrary proposition involves, serves also at once to establish that the obvious purpose of Congress in imposing the duty of selecting and submitting the selections when made to the final action of the Secretary of the Interior, was to bring into play the elementary principle of relation, repeatedly sanctioned by this Court and uniformly applied by the Land Department from the beginning up to this time under similar circumstances in the practical execution of the land laws of the United States." (The italics are ours.)

This Court in the Weyerhaeuser case then proceeds to examine and quote from a number of previous authorities, after which the Court says:

"Despite the doctrine of this court as expounded in the cases previously referred to, the unbroken practice of the Land Department from the beginning in the execution of land grants, impliedly sanctioned by Congress during the many years that administrative construction has prevailed, and the destructive effect upon rights conferred by land grant acts which would result

from applying the contrary view, it is yet urged that this must be done because of decisions of this court which it is insisted constrain to that conclusion. One of the decisions thus referred to is Sjoli v. Dreschel, 199 U. S. 564, to which we have previously referred, and others are cited in the margin."

Among such cases cited in the margin are Wisconsin v. Price County, relied upon by the lower court and by the Government in this case.

The Court then proceeds to analyze the cases which it is claimed hold to the contrary view, and says:

"What we have already said as to the Sjoli case would suffice to dispose of the suggestion concerning that case, but we shall recur to it. As to the other cases, it would be adequate to say that not one of them involved the question here under consideration nor even by way of *obiter* was an opinion expressed on such question. Indeed, all the cases relied upon may be placed in one of three classes:

"a, those involving the nature and character of the right, if any, to indemnity lands prior to selection; b, whether such lands, after filing of the list of selections and before action by the Secretary of the Interior thereon, could be taxed by a State to the railroad company as the owner thereof;

(Such a case was the case of Wisconsin v. Price County relied upon by the Court below and by the Government as sustaining the Government's position in this case.)

"and c, those which were concerned with the nature and character of acts which were adequate to initiate a right to public land which would be paramount to a list of selections when the acts

were done before the filing of the list of selections. In none of the cases, moreover, was the well-settled doctrine of this court as to relation, even by remote implication, questioned. Indeed, in most of the cases relied upon the previous decisions to which we have referred to expounding the doctrine of relation were approvingly cited or expressly reaffirmed.

"The Sjoli case, from the facts we have already stated, is clearly here inapplicable, because it falls in the third of the above classes. If it be conceded that general language was used in the opinion in that case which when separated from its context and disassociated from the issues which the case involved, might be considered as here controlling, that result could not be accomplished without a violation of the fundamental rule announced in Cohens v. Virginia, 6 Wheat. 399, so often since reiterated and expounded by this court, to the effect that 'General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.' The wisdom of the rule finds apt illustration here when it is considered that not even an intimation was conveyed in the Sjoli case of any intention to overrule the repeated prior decisions of this court concerning the operation and effect of the doctrine of relation upon the approval, by the Secretary of the Interior, of a lawful list of selections. That the general expressions in the Sjoli case are not persuasive here clearly results from the demonstration which we have previously made *that to apply them would be in effect to destroy the indemnity provisions of the granting act.* Moreover, that serious general injurious consequences would arise from treating the expressions relied upon in the Sjoli case as persuasive is clear, (a) because to do so would

result in the overthrow of the uniform rule by which the Land Department has administered land grants from the beginning, a rule continued in force after the decision in the Sjoli case, because of the administrative conclusion that that case should be confined to a like state of facts and not be extended to other and different conditions (25 Opin, Atty. Gen. 662; (b) because of the destructive effect upon rights of property and the infinite confusion which would now arise from extending, under the circumstances stated, the observations in the Sjoli case to the wholly different state of facts presented upon this record."

To the same effect, and elaborately reviewing the law on the whole question of indemnity railroad selections, was the case of Central Pacific Railroad Co. v. Lane, 46 Appeal Cases, District of Columbia, 347, recently decided.

If we adopt here the rule so clearly stated by this court that "general expressions in every opinion are to be taken in connection with the case in which those expressions are used," the general expressions in the Cosmos case are entirely without force to sustain the rejection of the selection in the case at bar.

Among the averments of the bill in the Cosmos case is an allegation,

> "That after the land had been selected by complainant's assignor, the defendants filed in the United States land office at Visalia, California, a written verified protest against such selection in which protest it was alleged that the land selected by Clarke was not subject to selection by him under the act of June 4, 1897, above referred to, *because the same was mineral land* and was included within the boundaries of a valid placer mining location. The protest asks that the Commissioner

> of the General Land Office should order a hearing to determine the mineral character of the land and that the selection by Clarke be rejected and disapproved, and the bill specifically avers that such protest is now pending before the Commissioner of the General Land Office."
>
> 190 U. S. 304. (The italics are ours.)

The bill discloses that the attempted selection in that case was made December 8, 1899. (190 U. S. 303.) There were answers as wells a demurrers to the bill. In these answers it was averred that the "Valid placer mining location" was made June 2, 1899, some six months prior to the selection. (104 Fed. 20, 25.)

Even without these answers, the bill disclosed on its face that the selection was challenged in the Land Office proceedings on two grounds.

1st. That the land was "mineral land" at the time of the selection, and was therefore not subject to selection.

2nd. That the land was not vacant, was not "unoccupied", because of the placer location, and on that ground was not subject to selection.

The bill also alleges that the proceedings were still *in fieri* and undetermined in the Land Department.

Notwithstanding this situation the prayer of the complainants was,

> "That complainant might have the judgment of the court that the full and complete equitable title to an undivided three-quarters interest in the property is vested in the complainant" etc.

This made the question quite anomalous. The judgment and decree asked for could not be entered by the court so long as the issues made by the selection and the protest were undetermined. The court was

dealing solely with the question of *what action might be taken by the court.* Under the situation there nothing but an adjudged or determined equitable title could authorize a decree by the court. The complainant's assertions that he had title and the allegations of the facts upon which he based his title would have been sufficient to withstand the demurrer if the court could try the cause; but as the court could not try the cause, those assertions and allegations of fact were without force. Since the court could not try the cause, those facts must be determined by the tribunal in which the issue was joined, and so long as the case was undetermined in that tribunal the complainants could not be heard to allege anything as to the facts that were in issue in that tribunal. The situation in which the case stood, therefore, determines the meaning of the general expressions. For example, take the one most relied upon "there must be a decision made somewhere (either in this court or elsewhere) regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land (to-wit, such title as would authorize the court to enter the decree prayed for) can exist." The title which would avail complainants in that case was not title in fact or title that might be ascertained by an investigation of the facts. It was such title as would require the decree in complainant's favor without any investigation of facts upon which the title was based, since the court could not make such investigation. In other words, the expression "complete equitable title" as very carefully used all through the opinion means and can mean only an adjudged and determined title such as requires no further trial upon any issue of fact.

The court in that case did not forget that the complainants asserted title both in the way of con-

clusions and in the way of allegations of fact from which title was derived, and indeed as to these allegations the court again used general language, which has been relied upon as supporting the contentions of the appellee here. For example, referring to these allegations, the opinion says, "These assertions may or may not be true."

Again, "The selector cannot decide the question for himself."

A moment's reflection would disclose that these are not general rules for testing the bill of complaint on demurrer, nor general rules for testing a bill asserting rights to public lands acquired by proper entry. Ordinarily the allegations of fact in the bill are taken as true upon demurrer. Why, then, does the court say, "These assertions may or may not be true"? Merely because the court was not in position in that case to try the facts. It could not accept allegations, though ordinarily they pass current upon demurrer. Adjudged title was required, and nothing except adjudged title could be complete equitable title such as would require or authorize action by the court in that case.

**17. The Authorities Relied Upon by the Government Here, in Addition to Wisconsin v. Price County and the Cosmos Case.**

The authorities relied upon by the Government, as cited in the courts below, are either those involving railroad indemnity selections, since shown in the Weyerhaeuser case not to be subject to the construction claimed by the Government here; or the Cosmos case, or cases following the same interpretation of the Cosmos case as the Government is here

urging; all of which latter cases are destroyed as authority, under the construction placed upon the Cosmos case by this Court in Daniels v. Wagner, and under any just construction of the Cosmos case.

Such cases based on this misconstruction of the Cosmos case are:

Clearwater Timber Co. v. Shoshone Co., 155 Fed. 612;

Buena Vista Land Co. v. Honolulu Oil Co., 166 Cal. 71;

United States v. McClure, 174 Fed. 510.

An examination of the land office cases relied upon by the Government in the courts below shows that all of them which sustain the Government's contention, rest upon this rejected interpretation of the Cosmos case, and consequently cease to be authority under the correct construction of the Cosmos Case as declared in Daniels v. Wagner. These were:

Miller v. Thompson, 36 L. D., 492;

The case of C. W. Clarke, 32 L. D., 233;

The case of Thomas B. Walker, 36 L. D., 495;

The case of Southern Pacific, 41 L. D., 264;

Administration Ruling, 43 L. D., 293-294.

No other departmental decisions were cited; and these all being disposed of by Daniels v. Wagner and by an analysis of the Cosmos case, there are left no departmental decisions to uphold the Government's construction of the forest lieu land act.

Counsel for the Government, maintained in the lower courts and the Court of Appeals holds that "A selection is not *made* until approval by the Department"; and in support of this view, they quoted from Lindley on Mines, 3rd Ed., Sec. 143, to that effect.

The only cases cited in support of this conclusion by Mr. Lindley are Wisconsin R. R. Co. v. Price Co.,

supra, and the Cosmos case. The only other cases relied upon by Mr. Lindley are the departmental cases which have been likewise disposed of by Daniels v. Wagner.

In extenuation, however, of Mr. Lindley's erroneous conclusions, it must be borne in mind, that his views were written in 1914, before Daniels v. Wagner, had corrected the erroneous conclusions that had been drawn in certain quarters from the Cosmos case.

**18. Further Analysis of the Contention of the Government Here, that a State Lieu Selection---Perfected in so far as the State's Action Can Perfect it---is Good as Against Subsequent Claims of Private Parties, but is not Good as Against the Government.**

We respectfully submit that in dealing with State Lieu Selections, where the State has fully complied with all the prerequisites for acquiring title to the selected land, there is no basis of authority for holding — as counsel for the Government and the lower court here hold, in attempting to explain away the meaning of Daniels v. Wagner — that while no private individual can, by subsequent entry, acquire any rights in the selected land, nevertheless, the United States is not bound by such a selection, and may lawfully withhold or dispose of the title at its pleasure.

We admit that there are many cases, such as Frisbie v. Whitney, 9 Wall. 187, and the Yosemite case, 15 Wall. 77, where — in dealing with inchoate titles, mere incipient rights to public lands, such as settlers and pre-emptors obtain before full compliance with the law — it is held that while such parties as

between themselves, acquire rights measured by the relative priorities of their settlements or entries, they acquire no vested rights as against the United States, until all of the pre-requisites of acquiring title have been complied with by them. These cases, however, do not help the Government's contention here, where all the pre-requisites of acquiring title had been fully complied with, long before any attempt was made by the Government to make other disposition of the selected land. Here the State of Wyoming had accepted the Government's statutory offer of exchange of properties, and had fully complied with the terms of such offer more than two years before the Government's attempt to withdraw the selected lands from entry; by doing so the State converted the Government's offer of exchange into a contract of exchange, fully executed on its part, and in which it had acquired a vested right to have the Government carry out its part of the contract. In such a case, the Government is as much bound by the selection as is any private claimant who thereafter seeks to make entry of the selected land.

In this connection we call the attention of the court to the decision of the Secretary of the Interior, in Clarke v. Northern Pacific Railway Co., 30 L. D. 145, involving a selection made under the Forest Reserve Lieu land act of June 4, 1897. In that case the selected land, after selection but prior to approval by the Land Department, was included in a Presidential order withdrawing the land from disposal until it was determined whether it should be reserved for forest purposes. The question the Department was called upon to decide, was, as to whether or not the withdrawal or attempted withdrawal could affect Clarke's selection of the land already made, but not

yet approved. After quoting the extract from the McDonald case, 30 L. D. 124, already quoted in this brief, the decision of the Secretary proceeds as follows:

> "The same principle announced in the case of McDonald applies in the case at bar. If the lands selected by Clarke were subject to selection at the time he made selection thereof, and if, as appears to have been the case, the lands embraced in his deed of relinquishment and reconveyance were proper bases for his selections, he acquired, at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands. The lands embraced in his selections were therefore not subject to the said withdrawal, having been previously appropriated and segregated from the other public lands in said township by such selections."

That it is full compliance with the law that vests title, and not the determination by any tribunal that the law has been complied with, is very forcibly stated by the Secretary in that case in the following language:

> "The rights of the selector, however, attach and take effect at the point of time when he has done all that is incumbent upon him to do in the premises, and are not postponed to the time when that fact is ascertained and declared by the land officers."

What was said by the Secretary of the Interior in the McDonald case, 30 L. D. 124, in construing the Forest Reserve Lieu Land act, applies with equal force here, to the selection made by the State of Wyoming under the State Lieu Land Act, viz:

> "After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or the legislative branch of the government could divest him of the right thereby acquired."

This principle is well stated by this Court, speaking through Mr. Justice Brewer in Ballinger vs. United States, 216 U. S., 240, 249, in the following language:

> "Whenever, in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation."

The Court in Leonard v. Lennox, 181 Fed. 760-763, with great clearness and accuracy announced and applied this doctrine. That was a controversy between a claimant under a Soldier's Additional Homestead entry, and a party claiming under a coal land patent; the question at issue was as to the effect of the discovery of coal after the homesteader had fully complied with the law, but before the final approval of his entry by the Land Department.

In announcing the principles applicable to the case, the court said:

> "To entitle one to a patent it is essential, among other things, that he comply with all the requirements of the statute under which he seeks the title and the authoritative regulations of the Land Department thereunder.

"When the right to a patent under such a law as the soldier's additional homestead law depends upon whether the land is agricultural or is known to be chiefly valuable for coal, that question must be determined according to the conditions existing at the time when the applicant complies with all the requirements of the statute and the authoritative regulations. If at that time the land is not known to be chiefly valuable for coal, he acquires a right to a patent which will not be disturbed by a subsequent change in the conditions;

* * * * * * * * *

"The appellant insists that the action of the officers of the Land Department in respect of this evidence was right, even if the appellee had done all that he was required to do to entitle him to a patent, because his application had not been allowed or passed to entry. This insistence cannot prevail. It not only is opposed to the settled rule that the character of the land — whether agricultural or known chiefly valuable for coal — must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, but is grounded in a misapprehension of the authority and duty of the officers of the Land Department in respect of such an application. Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, *but that they may ascertain whether or not the applicant has acquired a right to its allowance — a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises instead of at the time of its recognition by them.*"

(The italics are ours.)

**19. The Function of the Land Department was not to Create Rights in the State but to Determine Rights Already Created.**

Manifestly the *determination* by the Land Department (whenever that determination might be reached, whether in one year or fifty years) that the State surrendered such lands as were authorized to be surrendered and in the required manner, and properly selected such lands as the statute authorized to be selected, would not be the *creation* of the rights of the selector. The decision of the Land Department would be the mere judicial *ascertainment* of the rights already *created* by the selection, just as a decree of a court of equity quieting a plaintiff's title to real estate is not the creation of plaintiff's title, but the mere determination of the title already existing.

If it be conceded that all the facts exist entitling the selector to the approval of the Land Department, no power exists in that Department to withhold approval. That Department, the requisite facts being conceded, was not vested with any discretion in the matter. The offer being made by the sovereign nation to the sovereign state and accepted by the State, the only function of the Land Department was to ascertain judicially whether in fact the offer was so accepted. That Department had no authority or discretion to change or modify the terms of the offer or of the acceptance; nor did it have any authority to date the acceptance — to fix the point of time of the acceptance. That point of time was fixed by the acceptance itself. It seems to us that these conclusions follow from the decisions of this Court which we have cited in this brief, and we see nothing in the Cosmos case in the least in conflict with them.

**20. No Jurisdiction elsewhere to Interfere with Court's Determination of the Facts.**

In the case at bar the Land Department had reached a final decision upon the matter brought before it by the State's selection. That Department had refused to recognize the rights of the State acquired by compliance with the laws of the United States, and so far as it could do so had attempted to deprive the State of those rights. In this suit the whole controversy is brought before a court of ample jurisdiction. The suit is brought by the United States. All who have or claim any interest in the lands are made parties. The pleadings fully disclose each one's rights. The facts essential to the establishment of the rights of the State are all save one agreed. That one fact — the non-mineral character of the land at the time of the selection — is not denied — and is proven by the evidence without conflict and is found by the trial court. The attempted deprivation of the State of its interest in the land is thus brought before a court fully able to protect the rights of the State.

Cornelius v. Kessel, 128 U. S. 456, 461.

Black v. Jackson, 177 U. S. 349, 356.

Rector v. Gibbon, 111 U. S. 276, 291.

Martin v. Marks, 97 U. S. 345, 347.

Wirth v. Branson, 98 U. S. 118, 121.

Lessieur, et al. v. Price, 12 How. 59.

We submit that the decree of the Circuit Court of Appeals for the Eighth Circuit should be reversed,

and that the decree of the District Court for the District of Wyoming should be affirmed.

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# APPENDIX

Section 4 of "An Act to provide for the admission of the State of Wyoming into the Union, and for other purposes." (26 Stat. 222-224.)

"SEC. 4. That sections numbered 16 and 36 in every township of said proposed state, and, where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal sub-divisions of not less than one-quarter-section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said state for the support of common schools, such indemnity lands to be selected within said state in such manner as the legislature may provide, with the approval of the secretary of the interior; *Provided*, That section 6 of the act of congress of August 9, 1888, entitled 'An act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for other purposes,' shall apply to the school and university indemnity lands of the said state of Wyoming as far as applicable."

(R. S. Sec. 2275, as amended. Act Feb. 28, 1891, c. 384.)

"Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the

use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption of homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations; Provided, however, That nothing herein contained shall prevent any

State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

(R. S. Sec. 2276, as amended, Act. Feb. 28, 1891, C. 384.)

"That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to-wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one quarter and not more than one half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land; Provided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships."